IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 20TH JUNE 2007 / 30TH JYAISHTA 1929

SA.No. 57 of 1994()

AS.5/1990 of ADDL.SUB COURT, ALAPPUZHA
OS.856/1985 of ADDL.MUNSIFF COURT, ALAPPUZHA

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APPELLANT: APPELLANT/PLAINTIFF

LONAN PILLAI MANIKOM PILLAI,
KURISINKAL BANKU VEETTIL
CHETTIKADU MURI, MARARIKULAM THEKKU VILLAGE.

BY ADV. SRI.V.GIRI

RESPONDENTS:RESPONDENTS/DEFENDANTS

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1. GEORGE, KOCHEEKARAN VEETTIL, OMANAPUZHA,
   CHETTIKADDU MURI, MARARIKULAM THEKKU VILLAGE.

2. REETHAMMA GEORGE, W/O. DO. DO.
3. GEORGE BENNY, RESIDING AT DO. DO.
4. GEORGE SHAJI, DO. DO. DO. DO.
5. GEORGE ALBEY, DO. DO. DO.

BY ADV. SRI.M.V.IBRAHIMKUTTY &
" K.RAVU FOR R1 TO R5

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20 /6 /2007 THE COURT ON 20/06/2007 DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1860/1994 IN S.A. NO.57/1994

20.6.2007 DISMISSED SD/- M.SASIDHARAN NAMBIAR

JUDGE

/true copy/

P.S to Judge

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 57 OF 1994

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Dated this the 20th day of June, 2007

JUDGMENT

Plaintiff in O.S.856/1985 on the file of Additional Munsiff Court, Alappuzha is the appellant. Defendants are the respondents. Appellant instituted the suit seeking a decree for mandatory and prohibitory injunction. It was contended that including the plaint schedule property appellant was in possession of 52 cents under kuthakapattom lease in favour of his father and out of the said property, 10 cents lying on the north western side of the plaint schedule property was given to his Son Damayon Mary and another 10 cents abutting that property on the southern side was given to Chacko Mary and the remaining property is in the absolute possession of the appellant and respondents have no right whatsoever in the plaint schedule property. It was contended that respondents constructed a shed in the middle of

item No.1 of the plaint schedule property for conducting a tea shop and a thatched shed was also constructed trespassing into the property on the western side and the said constructions are unauthorised and illegal and therefore appellant is entitled to a mandatory injunction directing respodnents to remove the unauthorised constructions. Respondents filed a written statement contending that second respondent is having an extent of 24 cents and 674 square links and third respondent is having 4 cents and 433 square links of the property and case of the appellant that his father had 52 cents of land on kuthakapattom is false and it is for the appellant to prove that his father got the property by kuthakapattom. It was also contended that plaint schedule items 2 and 3 are owned and possessed by respondents 2 and 3 and the tea shop was in existence for the last 28 years and respondents 1 and 2 used to reside in the shop and respondents 1 and 2 are residing in item No.3 of the plaint

schedule property for the last five years and appellant is not entitled to the decree sought for.

2. On the side of the appellant apart from himself, two other witnesses were examined and five tax receipts were marked. On the side of the respondents, first respondent was examined as DW1 and two other witnesses were examined as Dws2 and 3. Eight exhibits including Exts.B1 and B2 patta issued by the Tahsildar were marked. Learned Munsiff on the evidence found that appellant did not establish the kuthakapattom in respect of 52 cents or that plaint schedule property was obtained on kuthakapattom and therefore held that appellant is not entitled to the decree sought for. The suit was dismissed. Appellant challenged the decree and judgment before Sub Court, Alappuzha in A.S.5/1990. Before the appellate court, appellant filed I.A.2103 an application under Order VI Rule 17 of C.P.C for a declaration that plaint schedule property was obtained by the appellant on kuthakapattom lease. Recovery of possession of

portion of the property in the possession of the respondents were sought to be added. Appellants also filed another application to implead the District Collector and the State of Kerala as additional defendants so as to enable the appellant to claim the relief sought for in the application for amendment of the plaint. Learned Sub Judge dismissed both the applications holding that the application for amendment if allowed, will change the nature and character of the suit and cause of action is also different and in any case at the belated stage, it cannot be allowed. On reappreciation of evidence, learned Sub Judge dismissed the appeal confirming the findings of the learned Munsiff. Second appeal is filed challenging the dismissal of the first appeal.

3. Learned counsel appearing for appellant was heard.

4. Though appeal was admitted, no substantial question of law was formulated at that time.

5. The suit was filed only for mandatory and

prohibitory injunction. What was contended by the appellant was that plaint schedule property is part of 52 cents of land obtained by his father on kuthakapattom and 10 cents each from the 52 cents were given his two children and they are in possession of the property and the remaining extent is in his possession and respondents have no right over the same and respondents have trespassed into the portion of the property and constructed a tea shop as well as a hut and they have no right to do so. Respondents contended that it is for the appellant to establish kuthakapattom as well as the right claimed. They also contended that under Exts.B1 and B2 patta they obtained 3.433 cents and 24.674 cents respectively and the said property is in their possession and appellant has no manner of right, title or possession over the same. Courts below on the materials placed and the evidence adduced found that there is no evidence to prove that father of the appellant had kuthakapattom or that the plaint schedule property forms part of

that property. On the other hand, relying on Exts.C1 report and C3 plan, courts below found that portions of the property in the possession of respondents are covered under Exts.B1 and B2 patta and therefore appellant is not entitled to get the decree. Exts.B1 and B2 show that the said pattas were granted as provided under Rule 9(2) of Land Assignment Rules, 1964 much prior to the institution of the suit in 1982. In the light of Exts.B1 and B2 and on the failure of the appellant to establish that plaint schedule property was part of kuthakapattom obtained by the father, court below rightly held that appellant is not entitled to the decree sought for. Though it was argued that first appellate court should have allowed the appellant to amend the plaint seeking a decree for declaration of title based on kuthakapattom after impleading the State, on the facts and circumstances of the case, I do not find that the order of the learned Sub Judge dismissing the application filed under Order VI Rule 17 or

under Rule 10 of Order 1 of Code of Civil Procedure to implead the State and District Collector, warrants any interference. The appellant cannot be permitted to change the very nature of the suit at the belated stage. No substantial question of law is involved in the appeal.

The appeal is dismissed. It is made clar that the dismissal of the appeal will not disentitle the appellant to claim relief, if any on the basis of title, if any.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.57 /94

JUDGMENT

20TH JUNE,2006